

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

In the Matter of	)	
	)	
Joint Application by SBC Communications Inc.,	)	
Southwestern Bell Telephone Company, and	)	
Southwestern Bell Communications Services,	)	CC Docket No. 01-194
Inc. d/b/a Southwestern Bell Long Distance	)	
for Provision of In-Region, InterLATA	)	
Services in Arkansas and Missouri	)	

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EVALUATION OF THE  
UNITED STATES DEPARTMENT OF JUSTICE

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DOJ Local Competition Comments	Comments of the U.S. Department of Justice, <i>In re: Implementation of the Local Competition Provisions in the Telecommunications Act of 1996</i> , FCC CC Docket No. 96-98 (May 16, 1996).
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DOJ Schwartz Aff.	Affidavit of Dr. Marius Schwartz on behalf of the U.S. Department of Justice (May 14, 1997), available at < <a href="http://www.usdoj.gov/atr/public/comments/sec271/bellatlantic/3813_exhibits.htm">http://www.usdoj.gov/atr/public/comments/sec271/bellatlantic/3813_exhibits.htm</a> >, and attached to DOJ New York Evaluation as Ex. 1.
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<i>FCC Texas Order</i>	Memorandum Opinion and Order, <i>In re: Application of SBC Communications Inc., Southwestern Bell Telephone Company, and Southwestern Bell Communications Services, Inc. d/b/a Southwestern Bell Long Distance Pursuant to Section 271 of the Telecommunications Act of 1996 to Provide In-Region, InterLATA Services in Texas</i> , 15 FCC Rcd 18,354 (June 30, 2000), available at < <a href="http://www.fcc.gov/Bureaus/Common_Carrier/in-region_applications">http://www.fcc.gov/Bureaus/Common_Carrier/in-region_applications</a> >.
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<i>MO PSC Monitoring Order</i>	Order Denying Motions to Reconsider Recommendation and Opening Case for Monitoring Purposes, <i>In re: Application of Southwestern Bell Telephone Company to Provide Notice of Intent to File an Application for Authorization to Provide In-Region, InterLATA Services Originating in Missouri Pursuant to Section 271 of the Telecommunications Act of 1996</i> , MO PSC Case No. TO-99-227 (Sept. 4, 2001), attached to MO PSC Written Consultation as Tab 5.
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SBC AR Dysart Aff.	Affidavit of William R. Dysart for Arkansas, <i>attached to</i> SBC Br. App. A-AR as Tab 7.
SBC AR Smith Aff.	Affidavit of J. Gary Smith for Arkansas, <i>attached to</i> SBC Br. App. A-AR as Tab 21.
SBC AR/MO II Coleman/Dysart/Smith Aff.	Joint Affidavit of Daniel J. Coleman, William R. Dysart, and David R. Smith for Arkansas and Missouri (Loop Maintenance Operations System Affidavit), <i>attached to</i> SBC Br. App. A-AR as Tab 5, App. A-MO as Tab 4.
SBC AR/MO II Kelly Aff.	Affidavit of Michael Kelly for Arkansas and Missouri (Ernst & Young's Loop Maintenance Operations System Review Affidavit), <i>attached to</i> SBC Br. App. A-AR as Tab 12, App. A-MO as Tab 12.
SBC Br.	Brief in Support of the Joint Application by Southwestern Bell for Provision of In-Region, InterLATA Services in Arkansas and Missouri, <i>In re: Joint Application by SBC Communications Inc., Southwestern Bell Telephone Company, and Southwestern Bell Communications Services, Inc. d/b/a Southwestern Bell Long Distance for Provision of In-Region, InterLATA Services in Arkansas and Missouri</i> , FCC CC Docket No. 01-194 (Aug. 20, 2001).
SBC July PMs <i>Ex Parte</i>	SBC Communications Inc., SBC Performance Data for Arkansas and Missouri for July 2001, SBC <i>Ex Parte</i> Submission, FCC Docket No. 01-194 (Aug. 24, 2001).
SBC LMOS Charts <i>Ex Parte</i>	SBC Communications Inc., SBC CABS/LMOS Database Comparison Charts, SBC <i>Ex Parte</i> Submission, FCC Docket No. 01-194 (Sept. 21, 2001).

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SBC MO II Dysart Aff.	Affidavit of William R. Dysart for Missouri, <i>attached to</i> SBC Br. App. A-MO as Tab 6.
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SBC MO II Tebeau Aff.	Affidavit of David R. Tebeau for Missouri, <i>attached to</i> SBC Br. App. A-MO as Tab 24.
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WorldCom Comments	Comments of WorldCom, Inc., <i>In re: Application by SBC Communications, Inc. for Authorization to Provide In-Region, InterLATA Services in Arkansas and Missouri</i> , FCC CC Docket 01-194 (Sept. 10, 2001).

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for Provision of In-Region,	)	
InterLATA Services in Arkansas and Missouri	)	

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EVALUATION OF THE  
UNITED STATES DEPARTMENT OF JUSTICE

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**Introduction and Summary**

The United States Department of Justice (“the Department”), pursuant to section 271(d)(2)(A) of the Telecommunications Act of 1996<sup>1</sup> (“the 1996 Act”), submits this evaluation of the joint application filed by SBC Communications Inc., Southwestern Bell Telephone Company, and Southwestern Bell Communications Services, Inc., d/b/a Southwestern Bell Long Distance on August 20, 2001, to provide in-region, interLATA services in Arkansas and Missouri.

This joint application to the Federal Communications Commission (“FCC” or “Commission”) is SBC’s second application for the state of Missouri and its first for the state of Arkansas. It follows SBC’s successful applications to offer long distance service in Texas, Kansas, and Oklahoma, as well as SBC’s decision to withdraw its initial application for section 271 authority in Missouri. The Department’s Evaluation of SBC’s first Missouri application

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<sup>1</sup> Pub. L. No. 104-104, 110 Stat. 56 (1996) (codified as amended in scattered sections of 47 U.S.C.).

(“Missouri I Evaluation”) focused primarily on the prices at which SBC offered unbundled network elements (“UNEs”). The Department also questioned, *inter alia*, whether SBC was providing competitors nondiscriminatory access to its maintenance and repair systems.

As the Department has previously explained, in-region, interLATA entry by a regional Bell Operating Company (“BOC”) should be permitted only when the local markets in a state have been “fully and irreversibly” opened to competition.<sup>2</sup> This standard seeks to measure whether the barriers to competition that Congress sought to eliminate with the 1996 Act have in fact been fully eliminated and whether there are objective criteria to ensure that competing local exchange carriers (“CLECs”) will continue to have nondiscriminatory access to the facilities and services they will need from the BOC in order to enter and compete in the local exchange market. In applying its standard, the Department considers whether all three entry paths contemplated by the 1996 Act -- facilities-based entry involving the construction of new networks, the use of the unbundled elements of the BOC’s network, and resale of the BOC’s services -- are fully and irreversibly open to competitive entry to serve both business and residential customers.

Many of the terms and conditions governing the availability of interconnection and UNEs in Arkansas and Missouri are the same as those in SBC’s successful applications for section 271 authority in Texas, Kansas, and Oklahoma. The operational support systems (“OSS”) by which SBC makes these wholesale inputs available to competitors appear to be the same as those reviewed as part of those prior applications. Although SBC has made significant progress toward opening the local markets in Arkansas and Missouri to competition using these previously reviewed processes, the record is incomplete on several issues that affect the ability of competitors to enter and compete successfully in those local exchange markets. First, it is unclear

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<sup>2</sup> See DOJ Oklahoma I Evaluation at vi-vii, 36-51.

whether SBC has adequately responded to concerns regarding pricing in Missouri. Second, the record does not yet demonstrate that SBC has adequately resolved problems with its maintenance and repair systems so that CLECs operating in Arkansas and Missouri have sufficient electronic access to those systems. Finally, the fact that SBC may not be subject to appropriate post-entry performance oversight and enforcement in Arkansas is cause for concern.

## **I. Entry into the Local Telecommunications Markets**

To determine whether SBC has fully and irreversibly opened the local telecommunications markets in Arkansas and Missouri to competition for both business and residential customers, the Department examines the three modes of entry contemplated by the 1996 Act: facilities-based entry, which is least dependent on the incumbent's wholesale inputs and cooperation; use of the incumbent's unbundled network elements; and resale of the incumbent's services.<sup>3</sup> The Department first looks to actual competitive entry, because the experience of competitors seeking to enter a market can provide highly probative evidence about the presence or absence of artificial barriers to entry.<sup>4</sup> Of course, entry barriers can differ by types of customers or geographic areas within a state, so the Department looks for evidence relevant to each market in a state.

### **A. Missouri**

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<sup>3</sup> See DOJ Schwartz Aff. ¶¶ 149-192; DOJ Schwartz Suppl. Aff. ¶¶ 26-60; DOJ Oklahoma I Evaluation at vi-vii, 36-51.

<sup>4</sup> See, e.g., DOJ Oklahoma I Evaluation at vi-vii, 41-42.

SBC estimates that competitors in Missouri serve approximately 296,000 lines, or slightly more than 10 percent of the total lines in SBC's service area, using all modes of entry.<sup>5</sup> Competitive entry in Missouri has not changed significantly since SBC filed its first application for section 271 authority in Missouri in April 2001, increasing by approximately 1 percent.<sup>6</sup> This increase is attributable primarily to CLEC growth in the business segment.<sup>7</sup>

The current record of CLEC entry in Missouri does not raise issues beyond those addressed in the Department's Missouri I Evaluation.

## **B. Arkansas**

In Arkansas, for business and residential customers combined, SBC estimates that CLECs using all modes of entry serve approximately 97,000 lines, or approximately 9 percent of the total number of lines in its service area.<sup>8</sup> According to SBC figures, CLECs serve approximately 13.5 percent of all business lines in Arkansas.<sup>9</sup> CLECs serve the vast majority of these business lines by means of their own facilities,<sup>10</sup> i.e., the CLEC operates its own switch and uses either its own network to connect directly to the customer premises or uses loops provisioned by SBC to

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<sup>5</sup> SBC Access Lines *Ex Parte* at 3.

<sup>6</sup> See SBC MO II Tebeau Aff. at 3 tbl.2.; SBC MO I Tebeau Aff. at 3 tbl.2 (CLECs served approximately 265,000 lines, or about 9 percent of the total lines, in SBC's service territory).

<sup>7</sup> See SBC MO II Tebeau Aff. Attachs. C-1, C-2 & C-5; SBC MO I Tebeau Aff. Attachs. C-1, C-2 & C-5.

<sup>8</sup> See SBC Access Lines *Ex Parte* at 3. Estimated market share will vary depending on the methodology used to estimate facilities-based lines. The Department relied on entries in the E-911 database. SBC, using multiple methodologies, estimates that CLECs serve between 6.2 and 10.3 percent of Arkansas lines. *Id.*

<sup>9</sup> See *id.* (CLECs serve approximately 58,000 business lines.).

<sup>10</sup> See SBC AR Smith Aff. Attach. C-1 (CLECs serve approximately 12 percent of all business lines using at least some of their own facilities.); SBC Access Lines *Ex Parte* at 3.

connect customers to its own network.<sup>11</sup> CLECs have used resale to serve less than 1 percent of all business lines,<sup>12</sup> and the UNE-platform to serve less than one half of 1 percent of such lines.<sup>13</sup>

CLECs serve approximately 5.6 percent of residential lines in Arkansas.<sup>14</sup> Nearly all such CLEC lines are served via resale.<sup>15</sup> CLECs serve less than 1 percent of all residential lines by using some or all of their own facilities and slightly more than one half of 1 percent using the UNE-platform.<sup>16</sup> There do not appear to be any providers of cable telephony to residential customers in Arkansas.<sup>17</sup>

There is little DSL entry: there are approximately 870 CLEC DSL lines in Arkansas.<sup>18</sup>

The low levels of CLEC penetration of residential markets in Arkansas and, in particular, the lack of use of the UNE-platform, may reflect higher UNE pricing in effect during most of the period preceding this application as opposed to the UNE prices on which SBC rests this application.

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<sup>11</sup> In this context “loops” refers to either UNE-loops or special access loops. The record does not contain the data necessary to calculate “fully” facilities-based lines independent of those served by means of loops leased from SBC. *See generally* SBC AR Smith Aff. ¶¶ 12-34; SBC MO II Tebeau Aff. ¶¶ 12-34.

<sup>12</sup> *See* SBC AR Smith Aff. at 14 tbl.7 (CLECs serve approximately 3,600 business lines via resale.); SBC Access Lines *Ex Parte* at 3.

<sup>13</sup> *See* SBC AR Smith Aff. Attach. C-1; SBC Access Lines *Ex Parte* at 3.

<sup>14</sup> *See* SBC Access Lines *Ex Parte* at 3 (CLECs serve approximately 40,000 residential lines.).

<sup>15</sup> SBC AR Smith Aff. at 5 tbl.3 (CLECs serve more than 30,000 residential lines via resale.).

<sup>16</sup> *See id.* (CLECs serve approximately 5,000 residential lines through CLEC facilities and 4,000 residential lines through the UNE-platform.); SBC Access Lines *Ex Parte* at 3.

<sup>17</sup> *See* SBC AR Smith Aff. Attach. E (no cable providers included in CLEC listing).

<sup>18</sup> *See* SBC July PMs *Ex Parte* at 65c (Performance Measure 65-08 (Trouble Report Rate -- DSL -- No Line Sharing)); Performance Measure 65-09 (Trouble Report Rate -- DSL -- Line Sharing)); *see also* SBC AR Dysart Aff. ¶ 61 (no DSL line-shared loops installed for CLECs in past three months).

## II. Pricing of Interconnection and Unbundled Network Elements in Missouri

In prior evaluations, the Department has consistently stressed the competitive importance of UNE prices based on forward-looking costs because “[p]rices which are not properly cost-based act as a barrier to entry; such prices may prevent entry entirely, or limit entry in type or scale.”<sup>19</sup> Thus, “[t]he implementation of proper pricing is a key prerequisite for section 271 approval.”<sup>20</sup>

In its Missouri I Evaluation, the Department urged the FCC to independently determine whether the prices were appropriately cost-based because the record suggested that non-cost-based considerations may have resulted in prices outside the range that a reasonable application of the FCC’s forward-looking cost methodology, Total Element Long-Run Incremental Cost (“TELRIC”), should have produced.<sup>21</sup> The Department also expressed concern with the large number of interim rates, many of which were troublingly high, and had been left unresolved for years.<sup>22</sup>

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<sup>19</sup> DOJ Kansas/Oklahoma Evaluation at 10; *see also* DOJ Missouri I Evaluation at 7-8; DOJ Massachusetts I Evaluation at 2 n.5, 19-21; DOJ South Carolina Evaluation at 35, 39. Pricing based on forward-looking costs “simulates the prices for network elements that would result if there were a competitive market for the provision of such elements to other carriers” and “will result in the creation of the ‘right’ investment incentives for competitive facilities-based entry, rather than distorting the entrant’s ‘make or buy’ decision with respect to the network element.” DOJ Local Competition Comments at 28-29. Prices that are set either above or below the element’s true economic cost can distort entry decisions and may impede the development of competition on the merits. *Id.* at 29.

<sup>20</sup> DOJ Missouri I Evaluation at 1.

<sup>21</sup> *Id.* at 2, 14. The Department found that prices in Missouri were higher than those in neighboring states which the FCC had found to comply with TELRIC, and that the disparities did not appear to be accounted for by cost differences. *Id.* at 10-13. The Department also reviewed the price-setting record in Missouri and pointed out various indications that the decisions of the Missouri Public Service Commission (“PSC”) on several key questions of method and input may not have complied with the FCC’s “forward-looking” requirements. *Id.* at 14-19.

<sup>22</sup> *Id.* at 19.

In its current filing, SBC continues to assert that the original Missouri rates comply with TELRIC principles. Nonetheless, “as a compromise to allay the concerns of some CLECs and others that the Missouri rates are too high,” SBC has lowered some of its permanent recurring and non-recurring rates.<sup>23</sup>

The Department’s pricing concerns with regard to the permanent rates, detailed in its Missouri I Evaluation,<sup>24</sup> will be moot *if* the FCC concludes that SBC’s reduced rates fall within the range that a reasonable application of TELRIC would produce.<sup>25</sup> SBC’s selective rate reductions, however, do not address the Department’s earlier concerns about the large number of interim rates in Missouri.<sup>26</sup> The Department notes that although collocation rates have been made permanent, other rates remain interim subject to continuing cost proceedings.<sup>27</sup>

### **III. Access to Maintenance and Repair OSS in Arkansas and Missouri**

The Department’s Missouri I Evaluation urged the FCC to give careful attention to concerns about SBC’s ability to provide nondiscriminatory access to its maintenance and repair

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<sup>23</sup> SBC MO II Hughes Aff. ¶ 56. The Missouri PSC approved the modifications to the M2A effective September 9, 2001. *MO PSC Revised Rates Order* at 4.

<sup>24</sup> DOJ Missouri I Evaluation at 10-19.

<sup>25</sup> See *FCC Massachusetts Order* ¶¶ 38-40 (expressing concern with particular inputs used to set Massachusetts loop rates but finding that the level of resulting rates fell within a reasonable range, as compared to previously approved rates, and thus complied with TELRIC principles). A new cost docket is pending in Texas. WorldCom Comments at 18-19 & n.27; see also AT&T Comments at 42. If the Texas Public Utilities Commission (“PUC”) were to reduce its UNE rates in the future, this could “undermine [SBC’s] reliance on those rates in [Missouri] and its compliance with the requirements of section 271.” *FCC Massachusetts Order* ¶ 30 (discussing Verizon’s reliance in Massachusetts on rates set in New York that were then under active reconsideration by the New York Public Service Commission).

<sup>26</sup> DOJ Missouri I Evaluation at 19; see also Sprint Comments at 23-27 (continuing to complain about the level and large number of interim rates in Missouri); NuVox Comments at 3-15 (same).

<sup>27</sup> See MO PSC Written Consultation at 28-29 & n.44.



functions, noting allegations that SBC had failed to update correctly its records of resale and UNE-platform ownership.<sup>28</sup> Such a failure could affect a competitor's ability to electronically submit a trouble ticket for an end-user customer and obtain information on the repair's status, as well as the accuracy of SBC's reported maintenance and repair metrics.<sup>29</sup>

In this application, SBC admits the existence of a problem that had affected the CLECs' ability to electronically submit trouble tickets and claims to have fixed the problem by ensuring that the multiple service orders associated with each UNE-platform order flow to its back-end systems in the proper sequence.<sup>30</sup> SBC also states that it has corrected the embedded base of erroneous records which had accumulated in the Loop Maintenance Operation System ("LMOS") and that the current number of erroneous records is less than 1 percent of the total records in LMOS.<sup>31</sup> Moreover, SBC commits to review LMOS records regularly (twice a month) and correct errors that continue to arise.<sup>32</sup>

CLECs contend that simply addressing the service order sequencing problem is insufficient to ensure that they will be able to electronically submit trouble tickets after a UNE-platform order

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<sup>28</sup> DOJ Missouri I Evaluation at 7 n.22.

<sup>29</sup> See *infra* notes 40-43 and accompanying text.

<sup>30</sup> SBC AR/MO II Coleman/Dysart/Smith Aff. ¶¶ 13-17.

<sup>31</sup> *Id.* ¶¶ 24-26 & Attachs. B-E (number of erroneous LMOS records declined from over 9 percent to well under 1 percent).

<sup>32</sup> *Id.* ¶¶ 27-31.

has been provisioned.<sup>33</sup> Ensuring that the records are updated in a timely manner also may be important.<sup>34</sup>

SBC admits that LMOS errors have occurred for reasons other than the service order sequencing problem on which it has focused.<sup>35</sup> The most recent evidence in the record suggests that on a regional basis, new LMOS errors have continued to arise at an increasing rate.<sup>36</sup>

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<sup>33</sup> AT&T Willard/Van de Water Decl. ¶¶ 20-21 (sample of July Missouri orders showing inability to electronically submit a trouble ticket on all orders completed within the most recent three days), ¶ 22 (sample of August Missouri orders showing inability to electronically submit a trouble ticket on 63 of 64 orders completed within the most recent three days); *see also* WorldCom Comments at 15-16 (“WorldCom’s recent experience in Texas indicates that the problem has not been entirely fixed. Over a recent two-week period, there were still some tickets that WorldCom could not submit electronically.”). *But see* AT&T Willard/Van de Water Decl. ¶ 24 (sample of August Texas orders showing improved ability to electronically submit a trouble ticket after the first day).

<sup>34</sup> AT&T points out that “by itself proper order sequencing does not ensure that an LMOS record is properly updated. . . . [T]he timeliness of the LMOS updating process is at least as important as order sequencing.” AT&T Willard/Van de Water Decl. ¶ 17.

<sup>35</sup> SBC AR/MO II Coleman/Dysart/Smith Aff. ¶¶ 22-23, 27 & n.16, 41 n.25. SBC provides little discussion or analysis of these additional process problems or the claimed resolutions. The Ernst & Young attestation on behalf of SBC alludes to the discovery of other errors during the review, but does not analyze the cause of these new errors: rather Ernst & Young “[d]etermined each of the reasons provided did not contradict SWBT’s assertion that system enhancements were designed to process D orders prior to C orders on retail or resale to UNE-P conversions.” SBC AR/MO II Kelly Aff. Attach. C (“Loop Maintenance Operations System Attestation Scope and Approach”) at 8.

<sup>36</sup> Setting the number of new errors (as found in each records sweep *since* the initial clean-up of the accumulated errors in the embedded base) against the monthly change in the total number of UNE-platform records in LMOS yields error rates of approximately 13 percent in May, 24 percent in June and the first two weeks of July, and 26 percent in the last two weeks of July. *See* SBC AR/MO II Coleman/Dysart/Smith Aff. Attachs. C, D & E. Because the denominator of this calculation includes SBC’s churn -- i.e., it reflects both the addition and disconnection of records in LMOS for a particular period -- it overstates errors as a percentage of new orders, and this overstatement may be greater for periods that are longer (such as the six-week June-July period). The churn, however, does not appear to account for the apparent trend in error rate given that the short, two-week period in July exhibits the highest error rate. The Department has focused on the rate of errors for new orders in LMOS, rather than the total errors in LMOS described by SBC, *see supra* note 31 and accompanying text, because new orders are particularly vulnerable to any problem. *See* SBC AR/MO II Coleman/Dysart/Smith Aff. ¶¶ 27-31 (Errors should be caught and corrected by SBC’s new LMOS review procedures twice a month.). The amount of new order activity would be the most accurate denominator for analyzing the level and trend of continuing LMOS errors on new orders.

SBC’s recent *ex parte* shows that the error rate for “Total CLEC UNE-P line activity” declined from 5.72 percent as of August 2 to 2.28 percent as of August 21. SBC LMOS Charts *Ex Parte* at 2. Additional explanation of the denominator SBC uses in this new calculation is needed. Any significant differences in error rates between types of line activity recorded in LMOS should also be analyzed. *See* SBC AR/MO II Coleman/Dysart/Smith Aff. Attach. F at F-5 (UNE-P orders may be for new service, conversions, and additional services to existing

Interestingly, the data indicate that the error rate has increased in Texas while the collective rate for Arkansas, Kansas, Missouri, and Oklahoma has declined,<sup>37</sup> thereby raising questions about the consistency of SBC's manual error correction performance between states.<sup>38</sup> Moreover, correction of the sequencing error may have had the additional effect of slightly increasing the time it takes SBC to update fully the LMOS records in its back-end systems.<sup>39</sup>

Ensuring that SBC's LMOS records are correct and available in a timely manner is important because CLECs need prompt and accurate access to SBC's maintenance and repair systems in order to resolve end-user customers' troubles<sup>40</sup> and to determine the status of those troubles in order to respond to their customers' needs.<sup>41</sup> Erroneous ownership records may deny

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customers). Although the *ex parte* shows that the most recent error rate has declined, these new data do not address the Department's concern about the apparent trend in error rates through August 2, because they do not fully overlap with the data originally filed.

<sup>37</sup> The error rates for Texas appear to have increased from approximately 10 percent for May, to 28 percent for June and the first two weeks of July, to 35 percent for the last two weeks in July. *See* SBC AR/MO II Coleman/Dysart/Smith Aff. Attachs. C, D & E. Meanwhile, the collective error rate for Arkansas, Kansas, Missouri, and Oklahoma has dropped from approximately 37 percent, to 9 percent, to 3 percent, during the same periods. *See id.*; *see also infra* note 38 (error correction for these four states handled by one team). As noted, this calculation imperfectly reflects the overall error rate due to churn. *See supra* note 36. SBC's most recent data also appear to show some disparity in the error rates between Texas and the other four states, although the gap may be closing. SBC LMOS Charts *Ex Parte* at 1-2 (error rate for Texas was 6.62 percent on August 2 and 2.38 percent on August 21; error rate for the other four states was 1.2 percent on August 2 and 1.63 percent on August 21).

<sup>38</sup> *See* SBC AR/MO II Coleman/Dysart/Smith Aff. ¶¶ 48-50 (describing September 2000 consolidation of management of eight teams handling manual correction of LMOS errors; currently one team in Oklahoma performs error correction for Arkansas, Kansas, Missouri, and Oklahoma, and two others are responsible for error correction in Texas).

<sup>39</sup> SBC AR/MO II Coleman/Dysart/Smith Aff. Attach. F at F-1, F-3 (showing percentage of C orders posting to CABS database on Day 1 "significantly lower" in June than in prior months). *But see id.* (additional "lag" appears to even out by Day 3).

<sup>40</sup> AT&T Willard/Van de Water Decl. ¶¶ 25-32 ("Most of the troubles that AT&T's customers experience occur within the first 72 hours after provisioning"); WorldCom Comments at 14-15 (CLECs' customers suffer delays in resolution of service problems).

<sup>41</sup> AT&T Willard/Van de Water Decl. ¶ 30 ("[T]he CLEC cannot determine the status of the trouble report electronically until after the LMOS record has been updated and the trouble report has been closed. Prior to that time, the CLEC can ascertain the status of the trouble report only through the cumbersome process of repeatedly contacting SWBT by telephone.").

CLECs this access and thus prevent them from providing their customers with the same level of service as SBC is able to provide its retail customers.<sup>42</sup> In addition, continuing errors in SBC's LMOS database may affect the reliability of reported maintenance and repair performance data, making it difficult for CLECs and regulators to gauge the adequacy of SBC's performance.<sup>43</sup>

Questions regarding the adequacy of CLEC access to SBC's maintenance and repair functionality date to SBC's initial application to offer long distance services in Texas.<sup>44</sup> Given the questions that remain unanswered in the current record, the Department cannot conclude that this problem has been adequately resolved. The Department urges the Commission to continue to give this matter careful attention and assure itself that these problems do not impede the CLECs' ability to compete using resale and the UNE-platform.<sup>45</sup>

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<sup>42</sup> SBC asserts that it clears troubles on manually submitted reports faster than it does on electronically submitted reports, suggesting that manual submission of trouble reports provides a meaningful opportunity for CLECs to compete. SBC AR/MO II Coleman/Dysart/Smith Aff. ¶¶ 46-47 & n.28. The calculation SBC uses in its affidavit defines the start time as the entry of the trouble ticket into LMOS. *Id.* n.28. Once the trouble ticket is successfully entered into LMOS, however, it is unclear why there should be any distinction between SBC's resolving manually or electronically submitted troubles. SBC's calculation does not appear to include any time between its receipt of the trouble ticket and the entry of that ticket into LMOS. *Cf.* SBC MO II Dysart Aff. Attach. C at C-73 (Performance Measure 39 (Mean Time to Restore) start time is SBC's receipt of the trouble report.). In addition, for CLECs attempting to submit trouble tickets electronically, the erroneous rejection and subsequent manual resubmission of these tickets adds a step and attendant delay to the resolution of the end-users' trouble. AT&T Willard/Van de Water Decl. ¶ 27. Further, the inability to electronically query the status of the trouble report may have a negative impact on the quality of CLEC services to end-users. *Id.* ¶¶ 30-32.

<sup>43</sup> *See, e.g., id.* ¶¶ 37-44. If LMOS lists the loop as working but not assigned to the particular CLEC, the CLEC will receive a message stating "this account is not part of your company profile[, d]o you wish to continue?" SBC AR/MO II Coleman/Dysart/Smith Aff. ¶ 33 n.20. The CLEC can elect to continue past this message and electronically submit a trouble ticket, but the trouble will not be listed as a CLEC trouble in SBC's maintenance and repair performance measures. *Id.* When the CLEC submits a ticket in these circumstances, SBC verifies ownership of the record before working the trouble. *See id.*; AT&T Willard/Van de Water Decl. ¶ 18. It is unclear how much time this verification adds to the process.

<sup>44</sup> *FCC Texas Order* ¶ 204 & n.568 (approving SBC's section 271 application and citing its claim to have enhanced systems for CLECs to electronically submit trouble tickets immediately after orders are provisioned).

<sup>45</sup> The Department notes that inquiry into these matters is proceeding at the state level. On June 1, 2001, the Texas PUC entered an order requiring, *inter alia*, an audit of SBC's LMOS database. *See* AT&T Willard/Van de Water Aff. ¶ 36 & n.9 (citing Order No. 33, Texas PUC Proj. No. 20400 (June 1, 2001)). On August 2, 2001, SBC and CLECs filed a jointly-proposed audit plan which would include audits of the claimed

#### IV. The Performance Remedy Plan in Arkansas

SBC's model interconnection agreements for both Arkansas and Missouri include Performance Remedy Plans ("PRPs") that appear to be very similar to those that the Commission approved in SBC's previous applications for section 271 authority in Texas, Kansas, and Oklahoma.<sup>46</sup> There is, however, cause for concern about the enforcement of the PRP in Arkansas because the Arkansas Public Service Commission ("PSC") has stated that it has only "limited authority to ensure future performance."<sup>47</sup> This apparent limitation is problematic for two reasons. First, for maximum effectiveness a post-entry performance plan should have a mechanism for modification in response to changes in the telecommunications industry and in the local market.<sup>48</sup> Although the Texas PUC has taken the lead within the five-state Southwestern Bell region in reviewing and modifying the Texas PRP during its six-month review process, it is unclear whether or how these changes will be incorporated into the Arkansas PRP.<sup>49</sup> Second, although SBC asserts that enforcement by the Arkansas PSC will not be needed,<sup>50</sup> it is unclear

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process enhancements and the performance measures that draw their data from LMOS. SBC AR/MO II Coleman/Dysart/Smith Aff. Attach. J. Both the Missouri and Arkansas Commissions recently issued orders to include data pertaining to performance in their states in the Texas audit. *MO PSC Texas Audit Order* at 3-4; *AR PSC Pricing/Texas Audit Order* at 5.

<sup>46</sup> SBC Br. at 159; SBC AR Dysart Aff. ¶¶ 5, 14; SBC MO II Dysart Aff. ¶ 14.

<sup>47</sup> AR PSC Second Consultation Report at 12. SBC asserts to the contrary that the Arkansas PSC has "ample authority" to enforce the PRP. SBC Br. at 160-61 & n.147.

<sup>48</sup> See *FCC New York Order* ¶ 438; *FCC Texas Order* ¶ 425.

<sup>49</sup> The Arkansas PSC staff had recommended that the PSC require SBC to file in Arkansas the new Version 2.0 of the Business Rules "together with any future revisions adopted by the T[exas] PUC." *AR PSC Pricing/Texas Audit Order* at 3. SBC supported the inclusion of Version 2.0 of the Business Rules in all existing A2As, but objected to filing or implementing in Arkansas "revisions for which there is no mutual agreement between the parties and which SWBT has appealed or otherwise challenged." *Id.* The Arkansas PSC has directed SBC to file in Arkansas any changes in the Business Rules or Performance Measures which are adopted by the Texas PUC to be effective in the A2A "concurrently with the dates the changes become effective and applicable to the T2A," subject to any challenge or stay in force in Texas. *Id.* at 4.

<sup>50</sup> SBC Br. at 160.

whether the PRP is adequately self-enforcing, i.e., whether SBC will automatically make payments if its wholesale performance falls to a statistically significant level of disparity.<sup>51</sup>

The Department has observed that an appropriately structured, self-executing PRP can help prevent backsliding and ensure that performance problems arising after section 271 approval are resolved quickly and effectively.<sup>52</sup> The effectiveness of the Arkansas PRP may be compromised by the Arkansas PSC's inability or unwillingness to enforce it.<sup>53</sup> It would be in the public interest for the Commission to ensure that SBC's wholesale customers in Arkansas have access to timely and effective enforcement of their interconnection agreements with SBC, including the performance provisions and remedies contained in these agreements.<sup>54</sup>

## **V. Conclusion**

This Evaluation discusses several issues that merit careful consideration by the Commission and preclude the Department from supporting this joint application on the basis of the current record. The Commission, however, may well receive additional information during the pendency of SBC's application. The Commission may therefore be able to assure itself the

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<sup>51</sup> See AT&T DeYoung Decl. ¶¶ 18-26 (AT&T complaint filed with Texas PUC protesting SBC's "improper" withholding of liquidated damages pertaining to performance in Texas).

<sup>52</sup> See DOJ Massachusetts I Evaluation at 22; DOJ Pennsylvania Evaluation at 14-17.

<sup>53</sup> In Missouri, it appears that SBC's post-entry performance will be subject to the terms of the Missouri PRP and also to the Missouri PSC's continuing oversight in Docket No. TO-99-227, which the PSC reopened "indefinitely for monitoring of [SBC] performance under the [M2A] and the Performance Remedy Plan." *MO PSC Monitoring Order* at 1; see also *MO PSC Written Consultation* at 30.

<sup>54</sup> See *FCC Michigan Order* ¶ 394 ("the absence of [self-executing] enforcement mechanisms could significantly delay the development of local exchange competition by forcing new entrants to engage in protracted and contentious legal proceedings to enforce their contractual and statutory rights to obtain necessary inputs from the incumbent."). The Department notes SBC's assertion that the FCC has the authority to interpret and enforce an interconnection agreement when a state commission fails to do so. *SBC Br.* at 161.

remaining questions have been answered and may be in a position to approve SBC's joint application by the close of these proceedings.

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### **Certificate of Service**

I hereby certify that I have caused a true and accurate copy of the foregoing Evaluation of the United States Department of Justice to be served on the persons indicated on the attached service list by first class mail, overnight mail, hand delivery or electronic mail on September 24, 2001.

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